(3)

Supreme Court, U.S.
FILED
JUN 8 200
CLERK

No. 00-1642

In the
Supreme Court of the United States

BEXLEY CITY SCHOOL DISTRICT, et al.,
Petitioners,

v.

JUSTIN KNABLE, a minor by and through his mother and next friend, Marilyn Knable,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

JULIE CARLETON MARTIN *
GREGORY B. SCOTT
SCOTT, SCRIVEN & WAHOFF LLP
50 W. BROAD ST.
25TH FLOOR
COLUMBUS, OH 43215
(614) 222-8686

JOHN C. ALBERT
CRABBE, BROWN & JAMES
500 S. FRONT STREET
SUITE 1200
COLUMBUS, OH 43215
(614) 229-4528

Counsel for Petitioners

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES ii

I. QUESTIONS PRESENTED 1

II. REASONS FOR GRANTING PETITION 2

A. This Court Needs To Provide Guidance To Lower Courts About The Obligations Of Public Schools And Parents In Tuition Reimbursement Cases. 2

B. This Court Needs To Provide Guidance To Lower Courts About The Appropriateness Of Parental Placements In Tuition Reimbursement Cases. 4

CONCLUSION 10

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Page(s)

CASES:

A.W. ex rel. N.W. v. Northwest R-1 Sch. Dist.,
813 F.2d 158 (8th Cir. 1987),
cert. denied, 484 U.S. 847 (1987) 7-8

Ash v. Lake Oswego Sch. Dist. No. 7J,
980 F.2d 585 (9th Cir. 1992) 3

Board of Educ. v. Rowley,
458 U.S. 176 (1982) 6

Cain v. Yukon Pub. Sch. Dist. 1-27,
775 F.2d 15 (10th Cir. 1985) 3

Daniel R.R.v. State Bd. of Educ.,
874 F.2d 1036 (5th Cir. 1989) 7

Devries v. Fairfax County Sch. Dist.,
882 F.2d 876 (4th Cir. 1989) 7

Florence County Sch. Dist. Four v. Carter,
510 U.S. 7 (1993) 2, 3, 4, 5, 9

Kerkham v. Superintendent, D.C. Public Sch.,
932 F.2d 84 (D.C. Cir. 1991) 8

Knable v. Bexley City Sch. Dist.,
238 F.3d 755 (6th Cir. 2000) 3, 5

M.S. v. Board of Educ. of City of Yonkers,
231 F.3d 96 (2d Cir. 2000),
cert. denied, __U.S. __, 121 S.Ct. 1403
(March 26, 2001) 8

Monticello Sch. Dist. No. 25 v. George L.,
102 F.3d 895 (7th Cir. 1996) 8

Oberti ex rel. Oberti v. Board of Educ.,
995 F.2d 1204 (3d Cir. 1993) 7

Patricia P. v. Bd. of Educ. of Oak Park,
203 F.3d 462 (7th Cir. 2000) 3

Pennsylvania Ass 'n for Retarded Children
("P.A.R.C.") v. Pennsylvania,
343 F.Supp. 279 (E.D. Pa. 1972) 6

Roland M. v. Concord Sch. Comm.,
910 F.2d 983 (1st Cir. 1990),
cert. denied, 499 U.S. 912 (1991) 3, 4

Schoenfeld v. Parkway Sch. Dist.,
138 F.3d 379 (8th Cir. 1998) 3

REGULATIONS:

34 C.F.R. § 300.403(c) (1999) 2, 5

34 C.F.R. § 300.550(b) (1993) 7

34 C.F.R. § 300.550(b) (1999) 7

34 C.F.R. § 300.552 (1993) 7

34 C.F.R. § 300.552(a)(3) (1993) 7

34 C.F.R. § 300.552(b)(3) (1999) 7

STATUTES:

20 U.S.C. § 1400 *et seq.* 2

20 U.S.C. § 1412(5)(B) (1991) 7, 8

20 U.S.C. § 1412(a)(5)(A) (1997) 7

20 U.S.C. § 1412(a)(10)(C)(iii)(III) (1997) 3

OTHER AUTHORITIES:

121 CONG. REC. 23,703 (1975) 6

121 CONG. REC. 23,709 (1975) 6

SUP. CT. R. 10 1

SUP. CT. R. 14 1

SUP. CT. R. 14.1(a) 1

SUP. CT. R. 15 1

I. QUESTIONS PRESENTED

Respondents have incorrectly restated and mischaracterized Petitioners' questions presented in contravention to SUP. CT. R. 15. See Brief in Opposition, p. i. The rule provides that a brief in opposition may raise an objection to consideration of a question presented based on what occurred in the proceedings below; it does not provide a vehicle for Respondents to present their own questions to the Court.

Respondents' argument lacks merit that Petitioners' challenge will not change the case's outcome because it does not seek review of the decision about the draft IEP. Cf. Brief in Opposition, pp. 15-17. Petitioners are fully aware that this Court does not sit as a court of error, but instead grants certiorari as a matter of judicial discretion based only upon compelling reasons. See SUP. CT. R. 10. Accordingly, the petition for writ of certiorari identifies important questions to the administration of the Individuals with Disabilities Education Act (IDEA) for this Court's review rather than specific assignments of error regarding the Sixth Circuit's erroneous factual findings and misapplications of the law. Cf. Brief in Opposition, p. 17. If certiorari is granted, the Court may consider such factual and legal errors as are fairly encompassed by the questions set forth in the petition. See SUP. CT. R. 14.1(a). Given that the first question presented specifically referred to the incompleteness of the IEP, that issue would be an appropriate subsidiary question.[1]

---

[1]In the petition for writ of certiorari, Petitioners set forth the statement of facts and course of proceedings below as required by SUP. CT. R. 14 to the extent necessary to provide context for this Court's review of the issues raised in the questions presented. Contrary to Respondents' assertion, Petitioners did not attempt in the petition, and do not attempt now, to provide an exhaustive

II. REASONS FOR GRANTING PETITION

A. This Court Needs To Provide Guidance To Lower Courts About The Obligations Of Public Schools And Parents In Tuition Reimbursement Cases.

This Court has held that parents are entitled to tuition reimbursement if a court finds (1) the school district failed to provide a free appropriate public education (FAPE), and (2) the parents' private placement is appropriate under the Act. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1993). This holding was incorporated into the 1997 amendments to the IDEA, 20 U.S.C. § 1400 et seq., and its implementing regulations. Specifically, 34 C.F.R. § 300.403(c) (1999) parallels Carter by providing that parents are entitled to tuition reimbursement for a unilateral enrollment if the court or hearing officer finds that the school district "had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate." Because of the parallel, this case would have proceeded in the same manner had it been brought after the 1997 amendments were in effect.

Petitioners' first question presented asks this Court whether parents' actions are a relevant factor in determining whether a school district has provided FAPE under the first prong of the Carter test. Neither Carter nor the amended statute and regulations addresses the issue of when parents' actions are relevant under the first prong of the Carter test. This is a threshold question of a school district's liability for tuition reimbursement. It is separate and apart from the

---

statement of facts or assignments of error by the court below.

question of remedy that is asked only after the parents have satisfied the two-pronged Carter test. Respondents have blurred the two concepts together and have focused their argument on remedy rather than liability. See Brief in Opposition, p. 12 (referring in argument heading to "fashioning equitable relief") and p. 24 (referring to 20 U.S.C. § 1412(a)(10)(C)(iii)(III) (1997) regarding tuition reimbursement being reduced or denied).

Other circuits have held, in the context of determining liability not remedy, that parents' actions are a relevant factor in determining whether or not a school district has provided FAPE under the first prong of the Carter test. See, e.g., Roland M. v. Concord Sch. Comm., 910 F.2d 983,995 (1st Cir. 1990), cert. denied, 499 U.S. 912 (1991); Patricia P. v. Bd. of Educ. of Oak Park, 203 F.3d 462, 468 (7th Cir. 2000); Schoenfeld v. Parkway Sch. Dist., 138 F.3d 379, 382 (8th Cir. 1998); Ash v. Lake Oswego Sch. Dist. No. 7J, 980 F.2d 585, 589 (9th Cir. 1992); Cain v. Yukon Pub. Sch. Dist. 1-27, 775 F.3d 15, 20 (10th Cir. 1985). The Sixth Circuit's decision in Knable v. Bexley City Sch. Dist., 238 F.3d 755 (6th Cir. 2000), which completely discounted the parents' actions that resulted in missed timelines and entirely ignored their actions that resulted in an incomplete IEP in its consideration of whether or not the school district provided FAPE, is in conflict with these decisions.

The Sixth Circuit never addressed the specific findings of the impartial hearing officer (IHO) and district court that the Knables contributed to the draft nature of the IEP because of their "steadfast insistence upon a residential placement." (JA 547) The Sixth Circuit also ignored Mr. Knable's fax to his attorney, sent before he received the draft IEP, asking, "How should I proceed with Bexley as far as informing them of our decision" and indicating, "I am also pursuing experts

who would testify." (Ex. 122, p. 3)

As the First Circuit recognized, the law ought not to abet parties who do not cooperate in the IEP process and then attempt to jettison the IEP because of problems created by their own obstructionism. See Roland M., 910 F.2d at 995. Under the precedent of the First, Seventh, Eighth, Ninth and Tenth Circuits in the cases cited above, and discussed at length in the petition, a school district will not be held to have denied FAPE when the procedural violations in the IEP process are due, at least in part, to actions by the parents. See Petition, pp. 13-19. However, the Sixth Circuit's decision places all of the responsibility on the school district to ensure that the "cooperative" IEP process is followed, regardless of - and, in fact, in spite of - the actions or attitudes of the parents. Review by this Court is needed to provide guidance to the lower courts on whether parents' actions are relevant in determining whether a school district has provided FAPE under the first prong of the two-pronged Carter test.

The Sixth Circuit's decision raises the bar significantly for public schools in its jurisdiction to meet the first prong of the Carter analysis. This Court needs to review this case to provide guidance to the lower courts on where that bar should be set for determining when a public school has offered FAPE and how the nature and timing of parental actions should affect the setting of that bar.

B. This Court Needs To Provide Guidance To Lower Courts About The Appropriateness Of Parental Placements In Tuition Reimbursement Cases.

The second prong of the Carter test requires that the parents' private placement is appropriate under the Act. Carter, 510 U.S. at 15. The important question presented for

this Court is what makes the parents' private placement appropriate. The amendments to the IDEA do not provide any guidance on this issue. Indeed the IDEA regulations simply restate the Carter standard with the following language, "the private placement is appropriate." 34 C.F.R. § 300.403(c) (1999).

Interestingly, Respondents agree with Petitioners that their private placement should have been judged by whether it was necessary. "The real dispute was over whether a residential placement was necessary to allow Justin to benefit from his education." Brief in Opposition, p. 22. Respondents claim ample evidence to support the necessity of their private placement by citing to testimony of Dr. Kathleen Quinn. However, the Sixth Circuit never addressed Dr. Quinn's testimony or the issue of necessity. The district court, on the other hand, did. It held that Dr. Quinn's testimony was not supported by the record[2] and that a residential setting was not necessary for Justin. (App. 60a) It held that Bexley could have provided FAPE to Justin and that Bexley was not responsible to pay for Grove School. (Id.) The Sixth Circuit never addressed Bexley's proposed placement of Harding School Plus outside the context of the draft IEP. Knable, 238 F.3d at 768 (App. 22a).

Although the Sixth Circuit never specifically addressed the necessity of Grove School, it specifically rejected the proposition that the parents had to place their son in the least restrictive placement. Knable, 238 F.3d at 770 (App. 28a). In so doing, the court eroded a cornerstone provision of the IDEA.

---

[2]The IHO provided a detailed analysis about why Dr. Quinn's testimony was not supported by the record. (JA 547-48)

As this Court noted in Board of Educ. v. Rowley, 458 U.S. 176, 194 (1982), Congress relied on right to education cases when drafting the Education for All Handicapped Children Act in 1975, now a part of the IDEA. One case specifically referred to in Rowley was Pennsylvania Ass'n for Retarded Children ("P.A.R.C.") v. Pennsylvania, 343 F.Supp. 279 (E.D. Pa. 1972). In that case, the district court observed that disabled students have been historically segregated in overly restrictive placements. Id. at 293-95. The district court went on to adopt a consent agreement that provided for children to be placed in the least restrictive placement. Id. at 307. In 1975, Congressman Biaggi spoke on behalf of passage of the bill and stated, "The bill calls for educating these youngsters in the classroom whenever possible, since this is the most ideal approach." 121 CONG. REC. 23,709 (1975). Similarly, Congressman Brademas explained how the 94th Congress changed the proposed legislation:

> [B]y adding important new provisions to the act which would require the States to establish a goal of providing full educational opportunities to all handicapped children; to provide procedures for insuring that handicapped children and their parents are guaranteed procedural safeguards in identification and placement of the handicapped child; and that where possible, the handicapped child be integrated into a normal classroom environment.

Id. at 23,703

The law reflected this preference for the least restrictive environment (LRE) at 20 U.S.C. § 1412(5)(B)

(1991). See also 34 C.F.R. § 300.550(b) (1993). The law also addressed the concerns raised in P.A.R.C. of children being placed in overly restrictive placements far from home at 34 C.F.R. § 300.552(a)(3) (1993), which provides that a child's educational placement should be as close as possible to the child's home.[3] The amendments to the IDEA do not substantively change these provisions. Compare 20 U.S.C. § 1412(5)(B) (1991) with 20 U.S.C. § 1412(a)(5)(A) (1997), 34 C.F.R. § 300.550(b) (1993) with 34 C.F.R. § 300.550(b) (1999), 34 C.F.R. § 300.552(a)(3) (1993) with 34 C.F.R. § 300.552(b)(3) (1999). Courts have consistently held that IDEA's provisions regarding LRE evidence the strong congressional preference for mainstreaming. See Oberti ex rel. Oberti v. Board of Educ., 995 F.2d 1204, 1213-14 (3d Cir. 1993); Devries v. Fairfax County Sch. Dist., 882 F.2d 876, 878 (4th Cir. 1989); Daniel R.R.v. State Bd. of Educ., 874 F.2d 1036, 1044 (5th Cir. 1989); A.W. ex rel. N.W.v.

---

[3]The note to 34 C.F.R. § 300.552 (1993) incorporates the analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (34 C.F.R. part 104-Appendix, Paragraph 24), which includes several points regarding educational placements of children with disabilities that are pertinent to the discussion of least restrictive environment:

> 2. With respect to placing a child with a disability in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parents' right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home, and this issue may be raised by the parent under the due process provisions of this subpart.

Northwest R-1 Sch. Dist., 813 F.2d 158, 162 (8th Cir. 1987), cert. denied, 484 U.S. 847 (1987).

The Sixth Circuit's decision in Knable that parental placements can be appropriate without meeting the LRE standard does damage to the IDEA and the congressional intent that students be placed in the least restrictive environment. Contrary to Respondents' contentions, other courts of appeals have not ignored LRE like the Sixth Circuit. In M.S.v. Board of Educ. of City of Yonkers, 231 F.3d 96, 105 (2d Cir. 2000), cert. denied, __ U.S. __, 121 S.Ct. 1403 (March 26, 2001), the court held, "IDEA's requirement that an appropriate education be in the mainstream to the extent possible, see 20 U.S.C. § 1412(5)(B) (1991), remains a consideration that bears upon a parent's choice of an alternative placement."

The District of Columbia Circuit likewise has judged a parents' unilateral placement against the LRE requirement. Kerkham v. Superintendent, D.C. Public Sch., 931 F.2d 84 (D.C. Cir. 1991). The court concluded that the parents' unilateral placement at a residential facility far from home was more restrictive than the local extended-day program offered by the school district. Id. at 87-88. The court further held that the nonresidential placement could confer some educational benefit on the child, that is, the residential program was not educationally necessary. Id. at 87-88. Contrary to the Sixth Circuit in Knable, the court also held that the benefit that the child received at the residential placement had no bearing on whether the school district must reimburse the parents for its cost. Id. at 88. See also Monticello Sch. Dist. No. 25 v. George L., 102 F.3d 895, 906 (7th Cir. 1996) (affirming decision that a unilateral residential placement was not appropriate because it was not the LRE for the student).

If the Sixth Circuit's decision is allowed to remain, parents in that jurisdiction may place their children in overly restrictive placements far from home and those placements will still meet the second prong of Carter and be considered appropriate under the Act. This Court's decision in Carter did not call for such a result that would abrogate the IDEA's least restrictive environment requirement. In Carter, this Court brought common sense to the review of parents' placement, that is, the parents' placement could not be thrown out on technicalities (e.g., being under public supervision and direction) when those technicalities could not be met because the parents had to operate outside the public system when placing their child in a private school. Carter, 510 U.S. 13-14. This Court did not want to impose requirements that "would effectively eliminate the right of unilateral withdrawal." Id. at 13.

The least restrictive environment requirement is not a mere technicality and would not eliminate options for parents. The least restrictive environment requirement is a critical component of the IDEA designed, in part, to keep children from being placed in overly restrictive placements far from home. Parental placements, such as the Knables' placement of Justin at a residential facility 500 miles from home, should not be considered appropriate under the Act when less restrictive alternatives, such as Harding School Plus, are available. As has already been argued, such a result inappropriately lowers the bar for parents in tuition reimbursement cases and can allow parents to be reimbursed for placements made for personal, not educational, reasons. See Petition, pp. 27-28. Moreover, such a result erodes a cornerstone of the IDEA, the least restrictive environment requirement. This Court must take this case to provide guidance on what makes a parental placement appropriate under the Act, specifically with respect to the least restrictive environment requirement.

III. CONCLUSION

Petitioners respectfully request that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

Julie Carleton Martin
Counsel of Record
Gregory B. Scott
Scott, Scriven & Wahoff LLP
50 West Broad Street, 25th Floor
Columbus, Ohio 43215
(614) 222-8686

John C. Albert
Crabbe, Brown & James
500 S. Front Street, Suite 1200
Columbus, Ohio 43215
(614) 229-4528

Counsel for Petitioners